Office-Supreme Court, U.S.
FILED
DEC 8 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 744

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,

Petitioner,

vs.

ARTHUR W. HORN,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of California

LOUIS M. WELSH
900 Wilshire Boulevard
Suite 1204
Los Angeles, California 90017
Attorney for Petitioner

JOHN J. BALLUFF
121 East Sixth Street
Los Angeles, California 90014

JOSEPH H. CUMMINS
WM. F. RYLAARSDAM
900 Wilshire Boulevard
Suite 1204
Los Angeles, California 90017
Of Counsel

Jeffries Banknote Company, Los Angeles — MA 7-9514

TOPICAL INDEX

Page

Citations to opinions below 1

Jurisdiction 2

How federal question is presented 2

Questions presented for review 2

Statutes involved 2

Statement 3

Reasons for granting the writ 4

I

Both questions presented for review raise the troublesome and important distinction between procedural and substantive rules 4

II

Question 1 should be reviewed because it involves: (1) a conflict between decisions of the California Supreme Court and of the United States Supreme Court; (2) a discrimination by the California Supreme Court against rights arising under federal law; (3) an issue of great importance to the integrity of the federal law 6

A. Conflict between the decisions of the California Supreme Court and an earlier decision of the United States Supreme Court 6

B. The determination of the California Supreme Court constitutes a prohibited discrimination against rights arising under federal law 7

C. National importance of the issue 9

III

Question 2, relating to the right to a unanimous jury verdict, needs to be decided by this Court because of uncertainty created by recent decisions of the United States Supreme Court and to insure uniformity of administration of the Federal Employers' Liability Act 9

Conclusion 11

APPENDICES

Page

APPENDIX A

Opinion of the District Court of Appeal..... App. p. 1

APPENDIX B

Opinion of the Supreme Court of the State of California..... App. p. 12

APPENDIX C

Statutes:

45 U.S.C. Section 2..... App. p. 25

45 U.S.C. Section 51..... App. p. 24

APPENDIX D

Excerpts from plaintiff's final argument..... App. p. 26

TABLE OF AUTHORITIES CITED

Cases	Page
Aydlott v. Key System Transit Co. 104 Cal.App. 621, 286 P. 456 (1930)	8
Bailey v. Central Vermont R. Co., 319 U.S. 350 (1943)	10
Brady v. Southern R. Co., 320 U.S. 476 (1949)	4
Dice v. Akron, C. & Y. R. Co., 342 U.S. 359 (1952)	9, 11
Diebler v. Wright, 119 Cal.App. 277, 6 P.2d 344 (1931)	8
Erie R. Co. v. Thompkins, 304 U.S. 64 (1938)	5
Gackstetter v. Market Street R.R. Co., 130 Cal.App. 316, 20 P.2d 93 (1933)	7
Guaranty Trust Co. v. York, 326 U.S. 99 (1945)	5
Harris v. Pennsylvania R. Co., 361 U.S. 15 (1959)	10
Jonte v. Key System 89 Cal.App.2d 645, 201 P.2d 562 (1949)	8
McKnett v. St. Louis & S.F. Railway Co., 292 U.S. 232 (1934)	8
Minneapolis & St. L. R. Co. v. Bombolis, 241 U.S. 211 (1916)	10, 11
Minneapolis, St. Paul, & Sault Ste. Marie Railway Co. v. Moquin, 283 U.S. 520 (1931)	6, 7, 9
People v. Hidalgo, 78 Cal.App.2d 926, 179 P.2d 102 (1947)	8
Rogers v. Missouri P.R. Co., 352 U.S. 500 (1957)	10

Statutes	
28 U.S.C. Section 1257(3)	2
45 U.S.C. Section 2, Safety Appliance Act	2, 3
45 U.S.C. Section 51, Federal Employers' Liability Act	2, 3, 4, 5, 6, 8, 9, 10, 11

Constitution	
United States Constitution, Seventh Amendment	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

NO. .....

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,

Petitioner,

vs.

ARTHUR W. HORN,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of California

---

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California, entered in the above entitled case on August 11, 1964.

Citations to Opinions Below

The opinion of the District Court of Appeal (Appendix A; pp. 1 to 11, inclusive) is reported at 37 Cal.Rptr. 387. The opinion of the Supreme Court of the State of California (Appendix B, pp. 12 to 23, inclusive), is reported at 61 A.C. 659, 39 Cal.Rptr. 721, 394 P.2d 561.

Jurisdiction

The judgment of the Supreme Court of the State of California was entered by opinion filed on August 11, 1964 (R.O.)*. Petitioner's timely petition for rehearing was denied September 10, 1964 (R.O.D.R.). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3).

How Federal Question is Presented

This is an action under 45 U.S.C. section 51 (Federal Employers' Liability Act) and under 45 U.S.C., section 2 (Safety Appliance Act) for injuries to plaintiff, a railroad employee.

Questions Presented for Review

1. Whether a state court verdict in a Federal Employers' Liability Act case can be permitted to stand, when it is based on passion and prejudice induced by misconduct of plaintiff's counsel.

2. Whether a state court has jurisdiction in a Federal Employers' Liability Act case to enter judgment on a verdict agreed to by only nine of twelve jurors.

Statutes Involved

The statutory provisions involved are 45 U.S.C., Section 51 (Federal Employers' Liability Act) and 45

* The record consists of Clerk's Transcript, Reporter's Transcript, Opinion of the California Supreme Court, and Order Denying Rehearing. Record references are used as follows:

Clerk's Transcript — C.T.
Reporter's Transcript — R.T.
Calif. Supr. Ct. Opinion — O.
Order Denying Rehearing — O.D.R.

U.S.C., Section 2. (Safety Appliance Act). (Appendix C, pp. 24 to 25, inclusive.)

Statement

Plaintiff was injured in the course of his employment by defendant and brought an action under the Federal Employers' Liability Act and the Safety Appliance Act.

In the course of the trial, before a jury in the Superior Court for the County of Los Angeles, and particularly during final argument, plaintiff's counsel engaged in conduct which the California District Court of Appeal characterized as "grossly prejudicial misconduct" (37 Cal.Rptr. 387, 389). The California Supreme Court noted that:

> "[T]he sum result of counsel's remarks was such as to create an atmosphere of bias and prejudice which manifestly was calculated to deprive defendant of a fair trial." [R.O. 11.]

The prejudicial arguments utilized by plaintiff's counsel are set forth in Appendix D (pp. 26 to 42, inclusive).

Defendant made timely motions for mistrial because of the misconduct (R.R.T. 850), for a new trial (R.R.T. 961) and requested cautionary instructions to the jury (R.R.T. 896). The motions were denied by the trial court and the requests for cautionary instructions designed to mitigate the misconduct were refused as "not proper" (R.R.T. 860).

The jury voted nine to three for a verdict in favor of the plaintiff in the sum of $149,000.00 and judgment was entered thereon.

Defendant appealed to the California District Court of Appeal from the judgment of the trial court. The intermediate court reversed the judgment for plaintiff on the ground of plaintiff's counsel's grossly prejudicial misconduct. Plaintiff thereupon was granted a hearing in the Supreme Court of the State of California, which affirmed the trial court judgment. The Supreme Court recognized the improper and prejudicial nature of counsel's conduct (R.O. 11), but held defendant had waived its rights by failing to make immediate objections and requests for jury admonitions (R.O. 11).

Petitioner made a motion for rehearing in the California Supreme Court which was denied on September 10, 1964 (R.O.D.R.).

Reasons for Granting the Writ

I

Both Questions Presented for Review Raise the Troublesome and Important Distinction Between Procedural and Substantive Rules.

The desirability of a uniform application of federal laws is recognized by this Court. *Brady v. Southern R. Co.*, 320 U.S. 476, 479 (1949). At the same time the states in applying federal laws, such as the Federal Employers' Liability Act, are permitted to apply their own rules of procedure. Difficulty arises when a rule which is traditionally considered to be procedural has a substantive effect and determines which party will prevail in the lawsuit. Petitioner contends that the right to a trial free from passion and prejudice and the right to a judgment

based on a unanimous jury verdict are substantive rights which cannot be altered by the state's rules of procedure.

At one time the difficulty in distinguishing substance from procedure prevailed in cases under *Erie R. Co. v. Thompkins,* 304 U.S. 64 (1938), where the federal courts had to draw this distinction in applying state law. The problem in that area was clarified in *Guaranty Trust Co. v. York,* 326 U.S. 99, 109 (1945), when Mr. Justice Frankfurter stated for the court:

> ". . . [T]he aspect that alone is relevant to our problem, namely, *does it significantly affect the result of a litigation* for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?" (emphasis added)

It is respectfully submitted that a similar statement of the distinction between substance and procedure is needed for cases under the Federal Employers' Liability Act. In order to insure uniformity of application of the Act in the various jurisdictions, conventional distinctions between what is "procedural" and what is "substantive" should not govern in these cases.

II

Question 1 Should be Reviewed Because it Involves: (1) A Conflict Between Decisions of the California Supreme Court and of the United States Supreme Court; (2) A Discrimination by the California Supreme Court Against Rights Arising Under Federal Law; (3) An Issue of Great Importance to the Integrity of the Federal Law.

A. Conflict between the decisions of the California Supreme Court and an earlier decision of the United States Supreme Court.

The decision of the California Supreme Court in refusing to grant a new trial because of recognized prejudicial misconduct conflicts with the decision of this court in *Minneapolis, St. Paul, & Sault Ste. Marie Railway Co. v. Moquin,* 283 U.S. 520 (1931). In the *Moquin* case this court clearly stated that state practice requiring objections and requests for admonition does not apply where counsel engages in prejudicial misconduct in a Federal Employers' Liability Act case. There also, this Court reviewed a Federal Employers' Liability Act case tried in a state court, wherein defendant had been denied a fair trial because of appeals to passion and prejudice by plaintiff's counsel. There also, the State Supreme Court found that defense counsel had failed to object and ask for admonitions and refused to grant a new trial. This Court held:

> "Nor need we inquire into the rules applicable in trials under state law. Whether under the state's jurisprudence the present record would entitle petitioner to a

new trial or to such a conditional order as was awarded is immaterial.

"In actions under the Federal statute no verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice."

The California Supreme Court indicated that the state rule requiring immediate objections governed in a case of this type. The Court stated:

"Defendant relies on cases in other jurisdictions where reversals have been had on the ground of improper argument by a plaintiff's counsel in spite of the fact the defense counsel failed to object . . . *Minneapolis, St. Paul, & Sault Ste. Marie Railway Co. v. Moquin,* 283 U.S. 520 (1931), . . . But we are aware of no California case wherein a plaintiff's verdict was reversed for misconduct during his counsel's argument in the lack of timely objections and a request that the jury be admonished where such an admonishment could be effective." (R.O. 13).

This ruling flatly contradicts the holding of this court in the *Moquin* case.

B. The determination of the California Supreme Court constitutes a prohibited discrimination against rights arising under federal law.

For many years California has recognized the well established rule that where misconduct is sufficiently serious an admonition to the jury could not cure it and no objection whatever is required. *Gackstetter v. Market*

Street R.R. Co., 130 Cal.App. 316, 325-27, 20 P.2d 93 (1933); *Diebler v. Wright*, 119 Cal.App. 277, 283, 6 P.2d 344 (1931); *People v. Hidalgo*, 78 Cal.App.2d 926, 179 P.2d 102 (1947).

In the instant case the California Supreme Court refused even to discuss this element of the problem or the defendant's requests for mitigating instructions to the jury.*

It therefore appears the California court in this matter created a special exception for cases arising under the Federal Employers' Liability Act. It is the rule a "state may not discriminate against rights arising under Federal law." *McKnett v. St. Louis & S. F. Railway Co.*, 292 U.S. 232, 334 (1934).

---

* The requested instructions read:

> "You are not to consider for any purpose what you yourself would take for an injury like that sustained by the plaintiff, nor are you to consider what you would want any relative of yours to get if he or she sustained such an injury. An appeal to you to consider such matters is improper and you are to disregard any remarks asking you to consider such matters."

Citing *Aydlott v. Key System Transit Co.* 104 Cal.App. 621, 286 P. 456 (1930); *Jonte v. Key System* 89 Cal.App.2d 654, 201 P.2d 562 (1949) (R.R.T. 896). The trial court denied this request for admonition (R.R.T. 859).

> "Remarks during argument that excite jurors' prejudice or passions, or unjustly enlist their sympathies, are improper and you are instructed to disregard any such remarks."

Citing *Aydlott v. Key System Transit Co.* 104 Cal.App. 621, 286 P. 456 (1930); *Jonte v. Key System* 89 Cal.App.2d 654, 201 P.2d 562 (1949); (R.R.T. 860). The trial judge also refused to give this instruction (R.R.T. 863).

C. National importance of the issue.

The question of counsel's conduct or misconduct is of importance to the administration of justice under the Federal Employers' Liability Act. It has consistently been petitioner's position the kind of misconduct involved here (see Appendix D, pp. 26 to 42, inclusive) could not have been cured by objections by counsel or admonitions by the trial court. The California Supreme Court agrees with petitioner that the conduct of plaintiff's counsel "was such as to create an atmosphere of bias and prejudice which manifestly was calculated to deprive defendant of a fair trial." (R.O. 11.) The issue therefore is whether a state court may, by applying a technical rule strictly as to the *timing* of objection and admonition, destroy the integrity of a federal law and thus sanction reprehensible means of obtaining a large award. That it cannot do so was clearly stated in *Minneapolis, St. Paul, & Sault Ste. Marie Railway Co. v. Moquin* (1931) 283 U.S. 520, *supra*.

III

Question 2, Relating to the Right to a Unanimous Jury Verdict, Needs to Be Decided by this Court Because of Uncertainty Created by Recent Decisions of the United States Supreme Court and to Insure Uniformity of Administration of the Federal Employers' Liability Act.

In *Dice v. Akron, C. & Y. R. Co.*, 342 U.S. 359, 363 (1952) this Court stated:

"It follows that the right to trial by jury is too substantial a part of the rights accorded by the Act to

permit it to be classified as a mere 'local rule of procedure' for denial in the manner that Ohio has here used."

This Court also recognizes that it was . . . "the intention of Congress to secure the right to a jury determination", . . . in a Federal Employers' Liability Act case. *Rogers v. Missouri P.R. Co.*, 352 U.S. 500, 509 (1957). In *Harris v. Pennsylvania R. Co.*, 361 U.S. 15, 17 (1959), Mr. Justice Douglas, in a concurring opinion, states that trial by jury guaranteed by the Seventh Amendment is ". . . part and parcel of the remedy . . ." under the Federal Employers' Liability Act, ". . . when suit is brought in state courts."

Admittedly, this Court implied in an early decision under the Act that there was no requirement for a jury trial where this was not provided for in a state's procedure, *Minneapolis & St. L. R. Co. v. Bombolis*, 241 U.S. 211 (1916), and held that where the state procedure permitted entry of judgment upon a less than unanimous verdict, neither the Seventh Amendment nor the Federal Employers' Liability Act required a unanimous jury verdict.

However, the import of this 1916 decision was qualified in *Bailey v. Central Vermont R. Co.*, 319 U.S. 350, 354 (1943), where the court stated:

"The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence.' . . . (citation) . . . It is a part and parcel of the remedy afforded railroad workers under the Employers' Liability Act."

Since the 1916 decision holding that a state rule permitting a less than unanimous jury verdict was acceptable in a case arising under the Federal Employers' Liability Act, was based upon the ground the right to a jury trial was merely procedural, *Minneapolis & St. L. R. Co. v. Bombolis*, 241 U.S. 211 (1916), *supra*, and since the court has now decided that this right is no longer to be viewed as being procedural, *Dice v. Akron C. & Y. R. Co.*, 342 U.S. 359, 363 (1952), *supra*, a substantial issue is raised whether the holding in the *Bombolis* case should continue to stand.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

LOUIS M. WELSH
Attorney for Petitioner

JOHN J. BALLUFF
JOSEPH H. CUMMINS
WM. F. RYLAARSDAM
Of Counsel

APPENDIX A

Opinion of the District Court of Appeal

In the District Court of Appeal of the State of California, Second Appellate District, Division Two.

Arthur W. Horn, Plaintiff and Respondent, vs. The Atchison, Topeka and Santa Fe Railway Company, a corporation, Defendant and Appellant. Civil No. 26736.

Filed: March 9, 1964.

Appeal from judgment of the Superior Court of Los Angeles County. Irving Hill, Judge. Reversed.

Robert W. Walker, J. H. Cummins, Edward J. Riordan for Appellant.

Boccardo, Blum, Lull, Niland, Teerlink & Bell, and Edward J. Niland for Respondent.

This is a suit for personal injuries brought under the Federal Employers Liability Act (45 U.S.C.A. § 51) and the Safety Appliance Act (45 U.S.C.A. § 2) against the defendant railroad. A jury verdict was returned in favor of plaintiff in the sum of $149,000.00. Defendant appeals from the judgment entered thereon.

At the time of the accident plaintiff was a 21-year old brakeman in the employ of the defendant railroad. The switch crew of which plaintiff was a member had just uncoupled and left a caboose in front of the station at Blythe, California. As the locomotive drew away from the caboose, plaintiff, from his position on the footboard at the rear of the locomotive, attempted to prepare the

coupler on the locomotive for the next coupling. In doing so he first tried the uncoupling lever, which he testified failed to open the knuckle of the coupler as it was designed to do. He therefore placed his left foot against the knuckle in an effort to push it open (a practice which, although in violation of the railroad's safety rules, was testified by plaintiff's witnesses to be the customary way to open the knuckle under such circumstances). At about the same time the engineer brought the locomotive to an unexpected halt, throwing plaintiff off balance. The caboose which had just been left in front of the station rolled forward against the coupler on the locomotive, crushing plaintiff's foot and necessitating its amputation above the ankle.

Although defendant urges several grounds for a reversal of the judgment, the principal assignment of error relates to the asserted prejudicial misconduct on the part of plaintiff's attorney during his argument to the jury. Since we have determined that this claim is well founded, and that the conduct of plaintiff's counsel does require a reversal, we deem it unnecessary to pass upon other points raised on this appeal.

During his argument to the jury plaintiff's attorney, Mr. Boccardo, used language and arguments which he would have us accept as being merely imaginative, colorful and aggressive. We are of the opinion, however, that his conduct in numerous instances carried him outside the bounds of proper argument and into an area that can only be characterized as grossly prejudicial misconduct. Some of the more flagrant examples are set out below.

One of the primary objectives of plaintiff's counsel during his argument seems to have been to disparage the defendant and defense counsel in the eyes of the jury. To this end he told the jury, after clearly implying that defendant and its counsel had wilfully suppressed evidence and falsified an exhibit, "All of which shows you and gives you a taint. In other words, there is a paint brush on this case from the defense standpoint. Everything they contended for stinks. That's it — in plain language. Everything they have done. They sit up here with smiles and smirks. All they are trying to do is beat a poor kid with a leg off out of what they owe him. . . ." He also told the jury that they had "seen the deceit practiced before them in this Courtroom. . . .", and had "seen the lack of sincerity demonstrated in this Courtroom . . ." He charged that the defendant's safety rules "were promulgated for one purpose, and that purpose is if there is an accident, to use it against the employee." Referring to defense counsel's argument to the jury, Mr. Boccardo stated: " . . . he tells you one thing, he says, the plaintiff gets nothing unless he proves negligence or law violation which helped cause his accident—that is the one thing he says that is true."

On the question of damages he said: "Now I want to discuss with you the amount of money that this boy should have at your hands. Now I think that you are in an enviable position. I would like to be in the position some day of being on a jury, of having a meritorious case tried before me, of having the privilege of once seeing that an injured, crippled, handicapped amputee got what the law says he should have and not what some cheap,

inconsiderate, inhumane people might think he ought to have. . . . [W]e are going to discuss the elements that you are going to compensate for if you want to do the job as jurors under your oath. If you want to disregard your oath, disregard the law, disregard the facts, you have that privilege. You can then be in the same boat as the Santa Fe—and live with yourselves the rest of your days. . . .

"Where it is coming from, how it is going to be paid, who is going to pay it, it is no concern of yours, you see. I say this so emphatically because in my blood, in my veins runs something in this type of case that just nauseates me when I think of the inhumanity of men to men sometimes; this lack of realization of the dignity of man."

We have quoted the foregoing excerpts at length to illustrate the method of attack pursued by Mr. Boccardo. In doing so it becomes obvious that the inflammatory language employed was designed to arouse the passions and prejudices of the jury against the defendant and its counsel, and was therefore a factor in denying defendant a fair and impartial trial.

It was, of course, highly improper for counsel to try to convey to the jury the impression that defendant and defense counsel were attempting to conceal or suppress facts. References to the "taint" and the "paint brush" on defendant's case, followed by the assertions that "Everything they contended for stinks"; that defendant was guilty of deceit and insincerity; and that certain defense witnesses had perjured themselves, were patent attempts to establish bad faith on the part of the defendant. As was said by the court in *Chicago & N.W. Ry. Co. v. Kelly,*

84 Fed.2d 569, at 576: "There is a vast difference between a defense which is without merit, but interposed in good faith, and a fraudulent or 'trumped up' defense. There was nothing in the record to justify an argument that the defendant fabricated testimony or that it did not sincerely believe that the accident happened in the manner its evidence tended to prove." To the same effect, see: *F. W. Woolworth Co. v. Wilson*, 74 Fed.2d 439, 442; *Missouri-K.-T.R. Co. of Texas v. Ridgway*, 191 Fed.2d 363. In *Keena v. United Railroads*, 197 Cal. 148, a similar accusation evoked from our Supreme Court the following comment which appears pertinent to the instant situation: "It is altogether too evident that the purpose of the accusation that evidence had been wilfully suppressed by the defendant was none other than to bolster up a weak case by creating a prejudice against the defendant in the minds of the members of the jury. Such means of winning a lawsuit cannot be commended or receive recognition and indorsement by this court, . . . " (Pages 159-160.)

It was also misconduct for counsel to make the numerous and vituperative charges implying that defendant and its counsel were calloused and inhumane, and without regard for the welfare of its employees. The remarks that "all they are trying to do is beat a poor kid with his leg off out of what they owe him"; that the jury should award more than "what some cheap, inconsiderate inhumane people might think he ought to have"; and the charge that defendant's safety rules "were promulgated for one purpose, and that purpose is if there is an accident, to use it against the employee" are without any

support in the record and could only have been designed to unjustly prejudice the defendant in the eyes of the jurors. Such language was improper and constituted misconduct. (*Jonte v. Key System,* 89 Cal.App.2d 654, 658; *Diebler v. Wright,* 119 Cal.App. 277, 282-283.)

In addition to the language of Mr. Boccardo already quoted, he indulged in these further appeals to the emotions and sympathies of the jurors: "I am talking to you with this fundamental premise: I believe you to be human beings possessed of every human emotion that a human being possesses. I don't believe you are sadists. I don't believe you want to look for some reason why you are not going to give Mr. Horn what he is entitled to because on the contrary I think you are going to look upon it as desirous of doing all that you can do under your power as a human being possessed of the milk of human kindness to rectify what has happened to one of the finest young men it has been my privilege to know." In *Woolworth Co. v. Wilson,* 74 Fed.2d 439, 443, the court pointed out: "Sympathy for suffering and indignation at wrong are worthy sentiments, but they are not safe visitors in the courtroom, for they may blind the eyes of Justice. They may not enter the jury box, nor be heard on the witness stand, nor speak too loudly through the voice of counsel. In judicial inquiry the cold clear truth is to be sought and dispassionately analyzed under the colorless lenses of the law."

Plaintiff's counsel did not restrict his appeals to the emotions of hate and sympathy, but also included the element of horror. Thus, without any bearing on the issues before the jury, he told them: "In the old days of

medicine, there is an interesting book that I have been reading recently, there was no anesthesia. They cut off a piece of a man's body—pulled out his tongue and put pincers on it and cut off a piece — no anesthetic; they had nothing; the blood squirted; they would take a big hot iron and sear it on there—sear it until the man yelled and screamed, and the agony was fantastic." Such language seems to have been calculated to horrify and shock the jurors, undoubtedly with the hope that some of the shock and horror would be transferred to the injury sustained by plaintiff.

The following additional excerpts relating to the computation of damages clearly show another type of improper argument indulged in by plaintiff's counsel: "I say to the devil with earning capacity for the time being; let's see what it is if you are just a housewife. Take one of you ladies with no earning capacity and you got to do your housework on a wooden leg. You can't go dancing. You can't go swimming. And it's you, or somebody you love for the rest of your days, for fifty years; you don't have any trouble thinking about $150,000 as peanuts.

"But when it is some poor wretch that doesn't belong to you, then you start thinking you are paying it out of your own pocket. You are not paying this out of your own pocket."

"Is there anybody on this jury who can honestly say, impartially say that they would sell their leg for one hundred thousand dollars if they never spent a minute of their time working forever more — then they are just different kind of people that I have known in the past. That is all I have to say . . .

"Now let us figure out the damages. Let's take every element and discuss it and appropriately fix an amount—not some amount that we want to give somebody that we hated and detested.

"How much do we want to give somebody we love, somebody who is near and dear to us? How much would we want to get ourselves if we were in that kind of a situation? Do it honestly, without any sympathy for him or the railroad."

"Now, if you put that amount in the same way you would like to have it put in if you were sitting over there where Horn is, knowing all you know about this case, or if it were your son, or somebody near and dear to you, then nobody is going to have any squabbles or squawks or complaints, I am sure."

The character of the plea contained in these quoted excerpts exemplifies the type of argument that has generally been denounced as an improper appeal to the sympathies of the jurors. As stated in *Zibbell v. Southern Pac. Co.,* 160 Cal. 237, at page 255: "It is, of course, improper for the jury to attempt to measure the damage occasioned by the injury and the sufferings attendant upon it, by asking themselves what sum they would take to endure what the plaintiff has endured, and must endure. . . . 'No rational being would change places with the injured man for an amount of gold that would fill the room of the court, yet no lawyer would contend that such is the legal measure of damages.' "

In an F.E.L.A. case similar to the instant one, the court in *Chicago & N.W. Ry. Co. v. Kelly,* 84 Fed.2d 569,

reversed a judgment for the plaintiff solely on the basis of improper and prejudicial remarks of plaintiff's counsel in his closing argument. The court stated at page 576: "It is unnecessary, we think, to go any further with the analysis of the argument of counsel for the plaintiff. He asked the jury to place themselves in the position of the plaintiff's mother or son or husband; a position which would have disqualified them to act as jurors."

We do not consider it necessary in the instant case to determine whether any one of the specific acts of misconduct cited above would be sufficient in itself to require a reversal. Of course we are aware that there have been in the past and may be in the future certain instances where improper language similar to some of that quoted above might not justify such a course of action. Under the circumstances of the present case, however, we believe that the cumulative effect of Mr. Boccardo's language was to create a climate of bias and prejudice based upon considerations which, as noted above, were improper and which therefore deprived defendant of a fair and impartial trial by appealing to and arousing the passions and prejudices of the jury. This conclusion leads us to the ruling of the Supreme Court in *Minneapolis, St. Paul & Sault Ste. Marie Railway Co. v. Moquin,* 283 U.S. 520, 521-522, where in reversing a judgment for a plaintiff in an F.E.L.A. case, the court stated: "In actions under the Federal statute no verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice. Obviously such means may be quite as effective to beget a wholly wrong verdict as to produce an excessive one. A litigant gaining a verdict thereby will

not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent."

Plaintiff contends that defendant has waived its right to complain of Mr. Boccardo's language by failing to interrupt his argument with timely objections and requests that the jury be admonished. In the factual context of this case, this contention is not persuasive.

The improper conduct of plaintiff's counsel was called to the attention of the trial court at the close of argument when defendant sought a mistrial on the basis of such misconduct. Hence this is not a case where a party remained silent, gambling on a favorable verdict, and then voiced the complaint for the first time on appeal.

Of course not every failure to interrupt argument of counsel, object to it, and request an appropriate admonition constitutes a waiver. There are cases where, as here, the misconduct is of such character as to have produced in the minds of the jurors an effect which, in all reasonable probability, could not have been obliterated by objection and admonition. (*Cote v. Rogers,* 201 Cal.App. 2d 138, 144.) Particularly apposite here is the statement of the court in *People v. George,* 72 Cal.App. 124, 131: "It is the general rule that an assignment of misconduct and a request that the court admonish the jury to disregard the objectionable statements are necessary as a foundation for a complaint of misconduct in the appellate court [citations]; the reason for the rule being, as stated, that the trial court may be given an opportunity to prevent by suitable instruction the harmful effect on the

minds of the jury. Where, however, the record fairly shows—as we think it does in this case—that the acts complained of are of such a character as to have produced an effect which, as a reasonable probability, could not have been obviated by any instructions to the jury, the absence of such assignment and request will not preclude the defendant from raising the point on appeal [citations]; and, according to the decisions cited, *supra,* and to the views of the court in *People v. Frank*, 71 Cal. App. 575, such cases furnish ground for reversal; and where it fairly appears, as here, all the evidence considered, that the irregularities complained of in all probability largely influenced the jury in arriving at their verdict . . . , such result is a miscarriage of justice."

The judgment is reversed.

FOX, P. J.

We concur:

HERNDON, J.

ROTH, J.

APPENDIX B

Opinion of the Supreme Court of the State of California

In the Supreme Court of the State of California, In Bank.

Arthur W. Horn, Plaintiff and Respondent, v. Atchison, Topeka and Santa Fe Railway Company, Defendant and Appellant.

Filed: August 11, 1964.

Defendant railway appeals from a judgment for plaintiff in an action for personal injuries brought under the Federal Employers Liability Act (45 U.S.C.A., § 51) and the Safety Appliance Act (45 U.S.C.A., § 2).

Plaintiff, who was 21 years of age and had been employed for several years by defendant, was working as a brakeman on a switch engine in defendant's yard at Blythe. He uncoupled a caboose from the engine, and as the engine pulled away he attempted to adjust the coupler in order that it would be in a condition to receive the next coupling. He stood on the rear footboard of the engine, and when the coupler would not respond to the control of the "cut" lever provided for that purpose he placed his left foot inside the coupler in an attempt to adjust it. The engine made an unexpected stop and the caboose, which unnoticed by plaintiff had been rolling forward, engaged the coupler before plaintiff could remove his foot therefrom. The foot was crushed and it was necessary to amputate it above the ankle.

Under the Federal Employers Liability Act defendant is not liable for any damages, and any assessment thereof is consequently illegal, except for "such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its . . . equipment." (45 U.S.C.A., § 51.) Similarly, the Safety Appliance Act, the other basis for defendant's claimed liability, provides that "It shall be unlawful for any common carrier . . . to haul . . . any car . . . not equipped with couplers . . . which can be uncoupled without the necessity of men going between the ends of the cars." (45 U.S.C.A., § 2.)

While defendant, by answer to the complaint, formally denied liability, its counsel nevertheless stated to the jury in his opening statement: "In spite of all this [the circumstances allegedly establishing absence of liability], ladies and gentlemen, I am not asking you for your verdict in favor of the Santa Fe Railway Company; I am going to ask you to pay him some money. I will, however, contend now and throughout the case and in my final argument, legally we don't owe the plaintiff a dime. Nevertheless, we want you to give him some money." Shortly thereafter defense counsel told the jury: ". . . we will ask you to find and give the plaintiff . . . $26,500.00."

During closing argument counsel for defendant further stated: "You have two possible verdicts under the law, one for the plaintiff and one for the defendant. You have one reasonable verdict under what I have told you, and that is a verdict for the plaintiff. I am asking you to bring in your verdict for the plaintiff, which will naturally carry

costs of suit too." Plaintiff's counsel then asked defense counsel to repeat the latter statement, and defense counsel responded: "I said I was asking for a plaintiff's verdict at your hands which would naturally carry court costs. . . . I have sought and received authority to tell you to give the plaintiff $3,360.00 [for prosthetic equipment and supplies for the remainder of plaintiff's expected life] . . . and . . . $23,290.00 [to compensate for the injury]. . . . " Plaintiff's verdict was in the amount of $149,000.00.

Although defendant contends that certain errors were made in admitting testimony, over its objection, as to good custom and practice in opening couplers which failed to respond to the operation of the cut lever, and as to the meaning of certain of defendant's safety rules, such objections go to the question of defendant's liability and the only reasonable conclusion on the record presented is that defendant conceded its liability to the trier of fact. Defense counsel's unequivocal invitations to a plaintiff's verdict can only be construed, in legal significance, as a concession of liability under the Federal Employers Liability Act or the Safety Appliance Act or both of them, in spite of earlier formal denials of such liability. Counsel, by his own statement, was authorized to make such concessions and his client is bound thereby in the absence of fraud. (Bank of America v. Lamb Finance Co., 145 Cal.App.2d 702, 708; Scafidi v. Western Loan & Bldg. Co., 72 Cal.App.2d 550, 561-562.) In any event, on the record thus presented, we cannot conclude that, at least as to the issue of liability, the claimed errors could have resulted in a miscarriage of justice.

As to the further contention that the award of damages is excessive, the only issue of any substance relates to defendant's claim of prejudicial misconduct in arguments to the jury on the part of plaintiff's counsel, Mr. James Boccardo. There were numerous items of claimed misconduct, the significant instances of which are set out below.

Defendant railroad brought into court and submitted as an exhibit the particular engine coupler which allegedly failed to operate for the plaintiff. There was repeated testimony that the coupler was identical in all respects as when removed from the engine except for markings on the component parts, and further testimony relative to the functioning of the particular coupler. Counsel for plaintiff, in comparing the exhibit with photographs of the coupler on the engine, noticed that the pin, a component part of the coupler, was different. He then drew out from defendant's witness on cross-examination that the pin had apparently been substituted. In commenting on the substitution, plaintiff's attorney remarked in his opening argument to the jury: "Where is the pin, by the way? Did some guy who knows something about railroading look at it and say, 'My God, all worn out', and throw it in the scrap heap where it belonged? You be the judge. All of which shows you and gives you a taint. In other words, there is a paint brush on this case from the defense standpoint. Everything they contend for stinks. That's it—in plain language. Everything they have done. They sit up here with smiles and smirks. All they are trying to do is beat a poor kid with a leg off out of what they owe him. . . ." Counsel also told the jury that they had "seen the deceit practiced

before them in this Courtroom. . . .", and had "seen the lack of sincerity demonstrated in this Courtroom."

In further relation to the exhibit plaintiff's counsel suggested to the jury that a Mr. Dray (a mechanical engineer employed by the National Casing Company who appeared as an expert witness for defendant) had perjured himself: "Dray gets up here under oath" and after conceding that the pin had been replaced, "the next day they got to rehabilitate the situation. So Dray, he is ready to jump through the hoop—after all, they sell the Santa Fe, I don't know whether it is millions or billions dollars worth of these things every year—so whatever Santa Fe wants, we will give you. . . . But the significance of those things are—the utter lack of care on the part of what they will say. In other words, say anything if it will suit the bill."

Plaintiff's counsel also undertook to characterize the defendant's conductor as a perjurer in the following language: "When he [the conductor, Mills] tells you that it is not custom and practice to open the thing with your foot when you are going away, he isn't telling you the truth. He is lying, you see, for the benefit of the Santa Fe because he knows and fears that his own conduct is in serious question in letting his daughter on the engine, and not passing the signals and doing all the things that he did that day. . . . What character of man is it who would lie to injure a man that he helped cripple for life? . . . Does it take courage to do what Mills did here? It doesn't take courage. It takes the kind of a soul, the kind of character that is despicable — that is what it takes."

After accusations that the engineer's testimony was also untruthful, plaintiff's counsel cast the jurors in the same mold should they not agree with him: "[W]e are going to discuss the elements that you are going to compensate for if you want to do the job as jurors under your oath. If you want to disregard your oath, disregard the law, disregard the facts, you have that privilege. You can be in the same boat as the Santa Fe — and live with yourselves for the rest of your days."

Counsel additionally made remarks intended to disparage defendant without particular reference to specific testimony. Typical of such remarks were: "Now I think that you are in an enviable position. I would like to be in the position some day of being on a jury, of having a meritorious case tried before me, of having the privilege of once seeing that an injured, crippled, handicapped amputee got what the law says he should have and not what some cheap, inconsiderate inhumane people might think he ought to have." Shortly thereafter he stated: "I say this so emphatically because in my blood, in my veins runs something in this type of case that just nauseates me when I think of the inhumanity of men to men sometimes; this lack of realization of the dignity of man. . . . When they do it to a man and they destroy his ability to enjoy life — what's a hundred thousand dollars, for Heaven's sakes."

In addition to the foregoing counsel for plaintiff made further appeals to the emotions and sympathies of the jurors: "I am talking to you with this fundamental premise: I believe you to be human beings possessed of every human emotion that a human being possesses. I

don't believe you are sadists. I don't believe you want to look for some reason why you are not going to give Mr. Horn what he is entitled to because on the contrary I think you are going to look upon it as desirous of doing all that you can do under your power as a human being possessed of the milk of human kindness to rectify what has happened to one of the finest young men it has been my privilege to know." Without any apparent relationship to factual matters before the jury counsel made the following appeal to the jurors' emotions: "In the old days of medicine, there is an interesting book that I have been reading recently, there was no anesthesia. They cut off a piece of a man's body — pulled out his tongue and put pincers on it and cut off a piece — no anesthetic; they had nothing; the blood squirted; they would take a big hot iron and sear it on there — sear it until the man yelled and screamed, and the agony was fantastic."

As to the computation of damages, counsel made these improper remarks: "I say to the devil with earning capacity for the time being; let's see what it is if you are just a housewife. Take one of ladies with no earning capacity and you got to do your housework on a wooden leg. You can't go dancing. You can't go swimming. And it's you, or somebody you love for the rest of your days, for fifty years; you don't have any trouble thinking about $150,000 as peanuts. . . . But when it is some poor wretch that doesn't belong to you, then you start thinking you are paying it out of your own pocket. You are not paying this out of your own pocket." On another occasion he stated: "Is there anybody on this jury who can

honestly say, impartially say that they would sell their leg for one hundred thousand dollars if they never spent a minute of their time working forever more — then they are just different kind of people that I have known in the past. That is all I have to say. . . .

"Now let us figure out the damages. Let's take every element and discuss it and appropriately fix an amount — not some amount that we want to give somebody that we hated and detested. How much do we want to give somebody we love, somebody who is near and dear to us? How much would we want to get ourselves if we were in that kind of a situation? Do it honestly, without any sympathy for him or the railroad."

Aside from the substitution of the pins in the coupler exhibit there are no grounds for the abusive and prejudicial remarks directed at defendant and its witnesses by plaintiff's counsel, and such remarks were highly prejudicial. The numerous charges intended to gain the jurors sympathies on the ground that defendant was calloused and inhumane, without regard for its employees' welfare, could only have been designed to unjustly prejudice defendant in the eyes of the jurors. (See Jonte v. Key System, 89 Cal.App.2d 654; Diebler v. Wright, 119 Cal.App. 277, 282-283.) The remarks intended to play upon the emotions of sympathy, shock and horror were likewise improper matters for the jury to consider. (See Woolworth Co. v. Wilson, 74 F.2d 439, 443.) And finally and most significantly in the circumstances of this case, it was improper to appeal to the jurors to fix damages as if they or a loved one were the

injured party. In Zibbell v. Southern Pac. Co., 160 Cal. 237, this court stated at page 255: "It is, of course, improper for the jury to attempt to measure the damages occasioned by the injury and the sufferings attendant upon it, by asking themselves what sum they would take to endure what plaintiff has endured, and must endure . . . 'No rational being would change places with the injured man for an amount of gold that would fill the room of the court, yet no lawyer would contend that such is the legal measure of damages.'" In Chicago & N.W. Ry. Co. v. Kelly, *supra,* 84 F.2d 569, in a Federal Employers Liability Act case similar to the instant one the court stated at page 576 in reversing for improper and prejudicial remarks by plaintiff's counsel in his closing argument: "It is unnecessary, we think, to go any further with the analysis of the argument of counsel for the plaintiff. He asked the jury to place themselves in the position of the plaintiff's mother or son or husband; a position which would have disqualified them to act as jurors."

The sum result of counsel's remarks was such as to create an atmosphere of bias and prejudice which manifestly was calculated to deprive defendant of a fair trial. Certainly such conduct cannot be condoned. However we are nevertheless persuaded to the conclusion that defendant has waived its right to complain by its failure to make timely objections, and the instant judgment should not be reversed.

At no time did counsel for defendant, an experienced trial attorney, interrupt plaintiff's counsel's opening or closing arguments to make objections as to the claimed

instances of misconduct. Instead he elected to sit by while the improprieties accumulated until the conclusion of the closing argument, and then move for a mistrial. The motion was denied as was a motion for a new trial on numerous grounds, including plaintiff's counsel's misconduct.

Generally a claim of misconduct is entitled to no consideration on appeal unless the record shows a timely and proper objection and a request that the jury be admonished. (Seffert v. Los Angeles Transit Lines, 56 Cal.2d 498, 509; State Rubbish etc. Assn. v. Siliznoff, 38 Cal.2d 330, 340; Hicks v. Ocean Shore Railroad Inc., 18 Cal.2d 773, 787; Cope v. Davidson, 30 Cal.2d 193, 202.) The purpose of the rule requiring the making of timely objections is remedial in nature, and seeks to give the court the opportunity to admonish the jury, instruct counsel and forestall the accumulation of prejudice by repeated improprieties, thus avoiding the necessity of a retrial. "It is only in extreme cases that the court, when acting promptly and speaking clearly and directly on the subject, cannot, by instructing the jury to disregard such matters, correct the impropriety of the act of counsel and remove any effect his conduct or remarks would otherwise have." (Tingley v. Times-Mirror, 151 Cal. 1, 23.) In the absence of a timely objection the offended party is deemed to have waived the claim of error through his participation in the atmosphere which produced the claim of prejudice. The motion for a mistrial in the instant case can hardly be deemed a timely objection as the claimed damage could not then be forestalled. Even then defendant did not request that the jury be admon-

ished to disregard the alleged improper statements made by plaintiff's counsel.

Defendant relies on cases in other jurisdictions where reversals have been had on the ground of improper argument by a plaintiff's counsel in spite of the fact that defense counsel failed to object. (See Minneapolis, St. Paul & Sault Ste. Marie Railway Co. v. Moquin, 283 U.S. 520; Chicago & N. W. Ry. Co. v. Kelly, *supra,* 84 F.2d 569.) But we are aware of no California case wherein a plaintiff's verdict was reversed for misconduct during his counsel's argument in the lack of timely objections and a request that the jury be admonished where such an admonishment could be effective. (See Keena v. United Railroads, *supra,* 197 Cal. 148; Love v. Wolf, 226 Cal.App.2d .....; Diebler v. Wright, *supra,* 119 Cal. App. 277; Peacock v. Levy, 114 Cal.App. 246; Jonte v. Key System, *supra,* 89 Cal.App.2d 654.)

In the instant case we do not deem Mr. Boccardo's misconduct to be of such a character that it could not have been obviated by timely objections and instructions. Defense counsel, by his passive silence, undoubtedly encouraged the repetition of arguments which he now characterizes as so prejudicial that we should overlook his failure to object. He concedes that individual improprieties do not constitute grounds for reversal, but that the cumulative effect thereof requires this result. In such circumstances an attack on the instances of misconduct at the onset, together with proper instructions from the court to both the jury and counsel, would not only have removed the effect of the initial improprieties but

would also have forestalled the commission of subsequent acts of misconduct. As this is the very reason for the rule requiring timely objections as a prerequisite to the assignment of misconduct on appeal, defendant cannot prevail in its assignment of the instant misconduct.

The judgment is affirmed.

PEEK, J.

We Concur:

GIBSON, C. J.
TRAYNOR, J.
SCHAUER, J.
McCOMB, J.
PETERS, J.
TOBRINER, J.

APPENDIX C

Federal Employers Liability Act,
45 United States Code, section 51.

Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth

shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

Safety Appliance Act,
45 United States Code, section 2.
Automatic couplers.

It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars. Mar. 2, 1893, c. 196, § 2, 27 Stat. 531.

APPENDIX D

Excerpts From Plaintiff's Final Argument.

By Mr. Boccardo:

". . . Every time I make out one of these jury checks, I can't help but feel how inadequate is the compensation." [R.R.T. 727.]

". . . you must disabuse your minds, if you can, of everything you may have heard thus far in previous jury trials about negligence, contributory negligence, and so forth. Under State laws, the law is completely and utterly different. This is an Act promulgated by Congress many years ago for the rights of people engaged in interstate commerce and in railroading. It is a special Act, and one must understand the philosophy behind an Act that says that the costs of industrial accidents in the operation of a railroad should be a cost of doing business rather than to be foisted upon the individual who is part of the work force, part of the national economy, so to speak; and that therefore this law must be applied with all liberality towards the adjudication of the rights of the injured man." [R.R.T. 728.]

". . . The reason is that these injured men would never be able to, after they came out of the anesthetic, after they got around to being able to establish any particular defect, when everything is under the control of the railroad, and they can do what they want with exhibits (as you found happened in this case) — so the fundamental philosophy behind the rule is one that favors the working man, and properly so. . . . I don't believe you are sadists.

I don't believe you want to look for some reason why you are not going to give Mr. Horn what he is entitled to because on the contrary I think you are going to look upon it as desirous of doing all that you can do under your power as a human being possessed of the milk of human kindness to rectify what has happened to one of the finest young men it has been my privilege to know." [R.R.T. 729-730.]

"Now here is an investigator, and the first thing we find out (and in weighing who is telling the truth and where the truth lies a lot of little things can be used, you see, a lot of little things like the things that happened right here in Court) — and the first thing we have, we have an investigator, Mr. Weese. Now Mr. Weese doesn't know much about railroading, apparently. He is just an investigator who goes out and takes some pictures. This picture comes from the defendant.

"We know that when the pin is up, if the thing is operating properly the knuckle comes open. Here is the picture. The first thing they tell us — what kind of an outfit are we dealing with anyhow?" [R.R.T. 742.]

". . . You see the elasticity of the oath. The next day (that happened late at night) the next day they got to rehabilitate the situation. So Dray, he is ready to jump through the hoop — after all, they sell the Santa Fe, I don't know whether it is millions or billions dollars worth of these things every year — so whatever Santa Fe wants, we will give you." [R.R.T. 743-744.]

"So Dray comes in after discussing it with counsel, and counsel questions Mr. Dray — 'The pin doesn't make any difference now:' 'No.' " [R.R.T. 744.] . . .

"But the significance of those things are — the utter lack of care on the part of what they will say. In other words, say anything if it will suit the bill.

"Then when we catch them redhanded, not only is the pin not the pin, but the part inside hasn't got the numbers on it, then they have to bring a lot of employees to demonstrate a comedy of errors that is indicative of the general conduct of care on the part of the railroad and its employees. They lose it, they ship it to one Johnson — the wrong Johnson. They dump it out in the back yard. Somebody puts it together, the pin is gone — and poor little Mr. Gallo (it has to be Mr. Gallo — it couldn't be Mr. McNulty — it has to be a little Paisanno of mine who has to take the rap and say he put the new pin in there. Poor Mr. Gallo. Poor Mr. Gallo — I bet he didn't even see that pin.)." [R.R.T. 744-745.]

"Where is the pin, by the way? The pin with the numbers on it? Did some guy who knows something about railroading look at it and say, 'My God, all worn out' and throw it in the scrap heap where it belonged? You be the judge.

"All of which shows you and gives you a taint. In other words, there is a paint brush on this case from the defense standpoint. Everything they contended for stinks. That's it — in plain language. Everything they have done. They sit up here with smiles and smirks. All they are trying to do is beat a poor kid with a leg off out of what they owe him. You would think it was some kind of a Ballet Russe that they were appearing before — some joke. This is serious business. This man's entire

future, his whole life depends on the outcome of this. And it is not for some counsel to get up with a big smirk, laugh it off that somebody goofed off; that they wanted to preserve the thing." [R.R.T. 745.]

". . . for twenty-eight years I have been representing the injured man, the widows, the orphans, the maimed, and the cripples — and in those twenty-eight years I have learned one thing: I don't know whether you are religious or not. It doesn't make any difference. But when you are right, there is an Omnipotent something that pulls the string.

"Here is the coupler in this Courtroom, supposed to be the coupler, supposed to demonstrate that everything was Jake on the day in question, and so help me in this Courtroom before your eyes it didn't work. It should have worked when Swanson was on the stand, and I pretty near broke my wrist trying to get the pin to drop. And I said to Swanson, 'Did it drop?' 'No.' " . . .

"Failure to operate in a manner in which it was designed, for Heaven's sake, is all we have to prove; and if it doesn't do it here in this Courtroom, isn't it logical then that it didn't do it on the day in question, and so it was necessary for Mr. Horn to open the thing up with his foot. And didn't that contribute to the happening of the accident. . . ." [R.R.T. 746.]

". . . but he — magnanimous Mr. Cummins, he says, 'I'm going to tell you to bring in a verdict for the plaintiff —' for peanuts. You knew from that day that this was only a question of how much; that it was a grandstand play on the part of Mr. Cummins; that he was going to be

magnanimous and give him a few beans that he wasn't entitled to. . . .

"Now I think that you are in an enviable position. I would like to be in the position some day of being on a jury, of having a meritorious case tried before me, of having the privilege of once seeing that an injured, crippled, handicapped amputee got what the law says he should have and not what some cheap, inconsiderate inhumane people might think he ought to have. I say to you that irrespective of earning capacity — forget that for a moment — that is only one element; we are going to discuss the elements that you are going to compensate for it you want to do the job as jurors under your oath. If you want to disregard your oath, disregard the law, disregard the facts, you have that privilege. You can be in the same boat as the Santa Fe — and live with yourselves for the rest of your days.

"I say to you that if Arthur Horn were a multi-millionaire; he never had to do a day's work in his life; if his income were one million dollars a month from the pumping of oil wells, and if he lost his leg, he would be entitled to no less than $100,000 for the leg, irrespective of any earning capacity or anything else.

"Let us consider that a moment. $100,000 for a leg. The man is 21 years old when he sustained this injury. Fifty years of expectancy of life. Every one of those years — every one of those days — every one of the hours of those days, if you please, on a wooden leg. Gets up in the morning — has to look at that crippled, that horrible stump and put on a wooden leg, or grab a crutch. Everything that he does, every step that he takes, painful.

"Neuroma on the tip of that stump which he says when it is struck it is an excruciating driving pain. Pain of the lost leg that he doesn't have, phantom pain. The inability to get up in the morning and say to his wife, 'Let's go water skiing; let's go bowling; let's play golf; let's go deer hunting.'

"Those things are taken from him with the loss of a leg. Irrespective of earning capacity — I am sick and tired, and I want to tell you so; I have talked to jurors after a case like this and they think they have done something because they have given some poor wretch a few measly dollars, and all they think about is how it would affect his earning capacity.

"I say to the devil with earning capacity for the time being; let's see what it is if you are just a housewife. Take one of you ladies with no earning capacity and you got to do your housework on a wooden leg. You can't go dancing. You can't go swimming. And it's you, or somebody you love for the rest of your days, for fifty years; you don't have any trouble thinking about $150,000 as peanuts.

"But when it is some other poor wretch that doesn't belong to you, then you start thinking you are paying it out of your own pocket. You are not paying this out of your own pocket. I couldn't pay it out of my own pocket. I haven't got it, or you haven't got it. That is not the measure. The measure is what of all the world's gold; what of all the billions and trillions there are in the world, how much represents what this man should have for that leg.

"Where is it coming from, how it is going to be paid, who is going to pay it, it is no concern of yours, you see. I say this so emphatically because in my blood, in my veins runs something in this type of case that just nauseates me when I think of the inhumanity of men to men sometimes; this lack of realization of the dignity of man." [R.R.T. 748-751]. . . .

"When they do it to a man and they destroy his ability to enjoy life — what's a hundred thousand dollars, for Heaven's sakes. With the inflationary spiral there is today, it is a very meager amount; and that I say to you is the one element — I say to you he is entitled to $100,000 for the loss of his leg, irrespective of all things. This takes care of the humiliation, the mortification, the mental distress. He is married. He has a little kid, a cute little [R.R.T. 751] boy. He can't play with that little boy; he can't play baseball with him. He can't play football with that little boy. He can't take that little boy deer hunting. He can't teach him to water ski. He doesn't even want to be seen in the presence of that little boy with his chopped-off leg.

"The mortification — you have to know, when you got some deficiency, when there is some part of your body that isn't right — it isn't what others think about it; you can look upon it one way — but the man that has that imperfection, it hits him in his guts. He feels that. Every time anybody looks at him he thinks they are pointing to it. And he feels it ever so much.

"And that is what the law means when it says, mental anguish, mental distress. When the law says humiliation

it means that and it means that he is to be compensated for it. And on fifty years life expectancy, three hundred and sixty-five days in a year, three hundred and sixty-five times fifty, that is eighteen thousand two hundred and fifty days that he has to know that he has a wooden leg. Why a hundred thousand dollars is about — it isn't even six dollars a day — it isn't even a dollar a day for pain, for humiliation, for anxiety, for all those things." [R.R.T. 752.]

". . . You have to evaluate pain. Let me help you to evaluate that pain.

"Society has looked at pain. The Penal law has looked at pain. It has said that there shall be no cruel and inhumane punishment. It has said to the murderer, 'You may be executed; your life may be taken, but by Heaven, it better be done in a painless fashion.' You got to use cyanide pills, the electric chair, that is a realization upon the part of society that pain is worse than death. You have known of wealthy people who have suffered from an incurable condition such as cancer, and they want death to obtain peace from pain. You never heard of anybody ask for pain, you never heard of that. Then the anesthetist, the man who discovered the anesthesia. They become medical heroes. Why? Because they could eliminate pain for an hour or two while the surgical operation was being performed. In the old days of medicine, there is an interesting book that I have been reading recently, there was no anesthesia. They cut off a piece of a man's body — pulled out his tongue and put pincers on it and cut off a piece — no anesthetic; they had

nothing; the blood squirted; they would take a big hot iron and sear it on there — sear it until the man yelled and screamed, and the agony was fantastic. But they were able to eliminate that by an anesthetic. You go into a dentist and you gladly pay $10 for a shot of novocain so that you don't feel that drill on the nerve — sure, ten bucks, absolutely cheap. But then when the defendant is called upon to pay for the pain that he has caused, he wants you to look at pain in some different fashion; he wants your mind to look at pain in a manner in which your body would never endure. For why — to get you, Ladies and Gentlemen, to depreciate that pain, to think you are doing something when you are talking about dollars for that pain.

"That is what pain is; pain is the enemy of mankind. Pain is the thing that destroys the man's ability to concentrate; destroys his ability to do things. It is the thing that a man has to be rehabilitated against.

"And in this case it is undisputed, Ladies and Gentlemen; there is no contradiction, for the rest of his life— 18,250 days of it, he is going to suffer pain. He is going to suffer the humiliation of being a gimpy, lag-behind guy. Give him $6 a day for that and don't worry about anything. That will be a minimum figure." [R.R.T. 753-754.]

". . . the judge has the power to cut a verdict or set it aside, too high. That is why you can't have an excessive verdict, remember that. You got to have a Good Housekeeping stamp of approval of his honor — can't raise it; can lower it." [R.R.T. 759.]

"Now, the actuary said, you will say, that you can take a lesser amount and put it in a bank, and so on. well let me tell you something about that, Ladies and Gentlemen of the jury. This is the way that business works out. Suppose you owe me $1,000 right now. Could I come to you and say, 'Tell you what we'll do—' Could you come to me and say, 'Boccardo, owe you $1,000 — tell you what I'll do — I'm going to give you $400 and we're square.' I say, 'How do you figure that?'

"Well, if you take $400 and stick it in a bank, in twenty years or thirty years it will be $1,000.

"I say, 'What are you talking about? You owe that to me now. Never mind what the future has in store. . . .' " [R.R.T. 761].

"So give the break to the injured man. He hasn't any more rights — this is his only forum. No other remedy. No Workmen's Compensation for these men. There is nothing but what you give him in this case from any and every source — that is it, Ladies and Gentlemen." . . .

"Heaven's sake! By the time you take all the costs of production out, and all the expenses of producing this play, why, what's left? The net, has got to be substantial to do justice that is due him, what he is entitled to under the law." . . . [R.R.T. 762.]

"The reason [for the Safety Appliance Act] is the preservation of the working force of the United States and the placing of the costs of industrial accidents on the industry as a cost of doing business, where it comes out and is deducted before income taxes. That's where

it should belong; that is where it is, and why it should be of a magnitude commensurate with the injury." [R.R.T. 762-763]. . . .

"It is the effect of the injury on that human being, that young man who had everything in store for him at the age of 21 years and is relegated to the ranks of the handicapped, the one-legged handicapped people." [R.R.T. 763]. . . .

"How fair is the Santa Fe to its employees? You heard what Mr. Huber said — he had to sue them to get them to talk to him. Let's follow the evidence and that it is the evidence — Mr. Huber said, 'The only way I could get them to talk to me was to sue them.' " [R.R.T. 820-821].

"This magnificent, benevolent society for the enhancement of the injured workman! How fair is this counsel? He told you that judgment carries Court costs. You know what Court costs are: Jury fees, or Reporter's daily fee — not the costs of the transcript; some miscellaneous ordinary witness fees at the rate of $2 a day — not the actual costs, not attorney fees, not things he has to pay — those come out of his award. But you are supposed to believe that that is going to be something he banks.

". . . He [plaintiff] could stand before you here if he could, but I will do it for him.

"Ladies and Gentlemen, I would like to tell you what it is to have one leg. You may think you are going to make me wealthy by giving me what my lawyer says I

should have. Let me tell you folks I would gladly forego it for the good leg that God gave me." [R.R.T. 821.] . . .

"And you would think they would bring into Court for demonstration to the jury one [coupler] that was so absolutely perfect, by golly, it couldn't miss, but right in their face it doesn't function. And it was proven time and time again." . . . .

"These various inspections — make me laugh. One of these men said they make it daily. One of these guys walks around with a piece of paper in his hands, looks down at the safety appliance — this is a safety appliance, so are the brakes a safety appliance, so are the grab-irons; so are all the hand holds. All of those are safety appliances decreed by Congress that they have to be perfectly working on every occasion or the railroad is liable." [R.R.T. 823.]

"The inspections are made by an employee who walks around the engine. This one was made, for Heaven's sake, while they were working the engine. Do it every day in the middle of the shift — do you want to tell me that that is an inspection?" [R.R.T. 823-824.]

"Now plaintiff's statement — no defect. What do you suppose this poor kid — in the first place, he never heard of the Safety Appliance Act or the results of it, undoubtedly because these men are coached about these rules: But do you hear any time that the railroad tells these men what their rights are? What happens if there is a failure of a safety appliance to work? Do you think they are told that when they go to work? They don't

know a thing about it. They have to learn that from a lawyer." [R.R.T. 825.] . . .

". . . These rules [of defendant] were promulgated for one purpose, and that purpose is if there is an accident, to use it against the employee." [R.R.T. 826.]

". . . In discussing whether or not the railroad exercised reasonable care, you got to think about it as a railroad, not as an individual. As a railroad possessed of engineers, mechanics, inspectors, conductors, tremendous personnel, engineering department, legal department, every part of their whole setup is what you consider — their magnitude, as to whether or not they exercised reasonable care under the circumstances." [R.R.T. 829-830.] . . .

"And that brings me to mind that the only man who says anything different is Mr. Mills. I wondered when I heard him testify about the character of a man like Mills.

"How would you like to be the man whose negligent conduct cost a young man his leg? You let your daughter get on there when you shouldn't have. You forgot to give orders that you should have. You goof-up in giving the orders when you do give them. Everything that you did in, around and about the place helped to lose this man his leg." [R.R.T 831.]

"Even when you go down to the hospital, when the man is crushed with pain — the doctor hasn't come there yet, the agony that the poor boy must be in — and he has to say to him, 'You don't have to mention my daughter if you don't have to.' "

". . . When he tells you that it is not custom and practice to open that thing with your foot when you are going away, he isn't telling you the truth. He is lying, you see, for the benefit of the Santa Fe because he knows and fears that his own conduct is in serious question in letting his daughter on the engine, and not passing the signals and doing all the things that he did that day.

"What character of men is it who would lie to injure a man that he helped cripple for life?" [R.R.T. 831-832.] . . .

"Does it take courage to do what Mills did here? It doesn't take courage. It takes the kind of a soul, the kind of character that is despicable — that is what it takes." [R.R.T. 833.] . . .

"Then he [Mr. Cummins] discusses — oh, he tells you one thing, he says, the plaintiff gets nothing unless he proves negligence or law violation which helped cause his accident — that is the one thing he says that is true." [R.R.T. 834.] . . .

". . . The engineer, Mr. Cummins told you, says it was a smooth stop. What do you expect the engineer to say, that it was an abrupt stop? He is just jumping through the hoop." [R.R.T. 835.] . . .

"They inspected it. They prepared it. They cleaned it. They manicured it, you may be sure. But before your eyes, so help me God, that thing failed to work on at least three separate and distinct occasions in the manner in which it was supposed to, and we have the testimony of Swanson who says, 'That's right, I worked it.'" [R.R.T. 837.] . . .

". . . And I say to you with the preparation for Court, is it conceivable that the coupler wouldn't work in Court? Inconceivable though it may be, it did not, either on the day in question or in Court." [R.R.T. 837.] . . .

"Now they say they never knew how this accident happened. They didn't know about the coupler knuckle not opening. Yet within thirty days after the happening of the accident, Mr. Dray had this picture taken. Another thing that shows how little they think of the truth — remember he said, 'Oh, it was just a pose — just a pose.' " [R.R.T. 838.] . . .

". . . I don't think this jury or any jury having seen what has been demonstrated to them in this Courtroom — having seen the deceit practiced before them in this Courtroom; having seen the lack of sincerity demonstrated in this Courtroom is going to say that Mr. Arthur Horn didn't tell you the absolute God's truth when he told you how this accident happened when he pulled that pin and had to put his foot over there in order to get it to open up." [R.R.T. 840.] . . .

"Is there anybody on this jury who can honestly say, impartially say that they would sell their leg for One hundred thousand dollars if they never spent a minute of their time working forever more — then they are just different kind of people that I have known in the past. That is all I have got to say.

"I say that one hundred thousand dollars for the mere loss of the limb is minimum. . . ." [R.R.T. 844.]

"How much do we want to give somebody we love, somebody who is near and dear to us? How much would we want to get ourselves if we were in that kind of a situation? Do it honestly, without any sympathy for him or the railroad." [R.R.T. 844-845.]

". . . You don't know what is going to happen from here on. But you tell the judge and the world and everybody how much it is worth a 21 year old man to lose a leg, in dollars. You write that down then, and then your duty is done, you see.

"Now, if you put that amount in the same way you would like to have it put in if you were sitting over there where Horn is, knowing all you know about this case, or if it were your son, or somebody near and dear to you, then nobody is going to have any squabbles or squawks or complaints I am sure." [R.R.T. 845.] . . .

". . . In my zeal of representing a client, sometimes I yell too loud; I say things — I make a remark that I shouldn't in proper decorum. We are all guilty of things like that. I want to say this, if I have done anything that you haven't liked, please excuse me on it. I apologize to you. It was unintentional. Outside of this Courtroom I will be happy to discuss anything about it, after the case is all in. But do me this one favor, please don't hold it against little Arthur Horn. He is the player. I am only the mechanic trying to do something for him — to do for him what he can't do for himself under the rules as they are. He has to have a representative and I happen to be that representative, good, bad, or indifferent." [R.R.T. 846-847.]

"I have tried this case with all the sincerity that I have at my command. I feel that his cause is just. I would be most heartmost disappointed if you didn't go along with me on the damages that I have asked for him because I think they are right and they are in line with what experience has indicated in the past to be judicious." [R.R.T. 847.]

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 8 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 744

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,

Petitioner,

vs.

ARTHUR W. HORN,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

Brief for Respondent in Opposition

JOHN W. MONTGOMERY
173 North Morrison Street
San Jose, California

JAMES F. BOCCARDO
EDWARD J. NILAND
Community Bank Building
111 West St. John Street
San Jose, California
Attorneys for Respondent

SPARTAN PRINTING CO., INC., SAN JOSE, CALIFORNIA

TOPICAL INDEX

page

Opinions below. 1

Questions presented. 2

Statement of the case. 2

Argument. 5

I.

The decision of the California Supreme Court does not present any federal question. 5

A. The determination of the California Supreme Court is based solely upon the application of a state rule of procedure. 5

B. The decision of the California Supreme Court does not involve any discrimination against rights arising under federal law. 8

C. There is no conflict between the decision of the California Supreme Court and any decision of the United States Supreme Court. 9

II.

The question of the right to a unanimous jury verdict was never raised in the State Court, and this contention is not entitled to any consideration at this time. 11

III.

There is no uncertainty or lack of uniformity in the decisions denying a federal right to a unanimous jury verdict in a state action under the Federal Employers' Liability Act. 12

Conclusion. 13

TABLE OF AUTHORITIES CITED

— — — —

Cases

page

Atlantic Coast Line Railroad Company v. Mims, 242 U.S. 532 7
Chicago R. I. & P. R. Co. v. Ward, 252 U.S. 18 12
Congress of Industrial Organizations v. McAdory, 325 U.S. 472 11
Cope v. Davison, 30 Cal. 2d 193 8
Dice v. Akron C. & Y. R. Co., 342 U.S. 359 12
Diebler v. Wright, 119 Cal. App. 277 6
Edelman v. California, 344 U.S. 357 11
Gackstetter v. Market Street R. R. Co., 130 Cal. App. 316 6
Hicks v. Ocean Shore Railroad, Inc., 18 Cal. 2d 773 8
Irwin v. Globe-Democrat Publishing Company, 368 S.W. 2d 452 12
Minneapolis & St. Louis R. Co. v. Bombolis, 241 U.S. 211 .. 12
Minneapolis, St. Paul, & Sault Ste. Marie Railway Co. v. Moquin, 283 U.S. 520 9
Peacock v. Levy, 114 Cal. App. 246 6
People v. Hidalgo, 78 Cal. App. 2d 926 6
People v. Lyons, 47 Cal. 2d 311 6
Scott v. Times-Mirror Co., 181 Cal. 345 6
Sefert v. Los Angeles Transit Lines, 56 Cal. 2d 498 8
State Rubbish etc. Assn. v. Siliznoff, 38 Cal. 2d 330 .... 5, 8
Vivian v. Atchison, Topeka & Santa Fe Railway Co., 69 N.M. 6 12

Statutes

Federal Employers' Liability Act 2, 3, 8, 11, 12

Texts

5 Am. Jur. 2d, Section 624, pages 82 et seq. 7
4 C.J.S., Section 297 (2) (a), pages 918 et seq. 7

Constitution

United States Constitution, Seventh Amendment 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 744

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,

Petitioner,

vs.

ARTHUR W. HORN,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

Brief for Respondent in Opposition

Opinions Below

The opinion of the District Court of Appeal of the State of California, Second Appellate District, Division Two, is reported at 37 Cal. Rptr. 387. The opinion of the Supreme Court of the State of California is reported at 61 A.C. 659, 39 Cal. Rptr. 721, 394 P. 2d 561.

Questions Presented

1. Whether the defendant in a Federal Employers' Liability Act case, tried in a state court and resulting in a jury verdict in favor of the plaintiff, has an absolute federal right to a new trial on the ground of improper argument on the part of plaintiff's counsel, notwithstanding the fact that the highest court of the state has determined (a) that the defendant conceded to the jury that it was liable to the plaintiff, (b) that the verdict was not excessive as a matter of law, and (c) that under state procedural rules uniformly applied in all civil jury actions, the defendant had waived any right to an appellate consideration of its claims of misconduct.

2. Where such defendant failed to assert at any stage of the proceedings in the state court that it had a right to a unanimous jury verdict, and where the United States Supreme Court has repeatedly denied that a unanimous jury verdict is mandatory in Federal Employers' Liability Act cases tried in state courts, is the defendant entitled to raise this question for the first time in a Petition for a Writ of Certiorari.

Statement of the Case

The plaintiff, a twenty-one year old employee of the defendant, lost his left foot on the job as a result of the defective condition of a coupling device. He

brought an action against the defendant under the Federal Employers' Liability Act and also under the Safety Appliance Act.

Throughout the trial defendant's counsel repeatedly requested the jurors to return a verdict in favor of the plaintiff, stating that he had received authority to ask them to award the sum of $26,650.00 (R.R.T. 49, 234, 248, 818, 819). In his final argument to the jury, defendant's counsel stated that the only reasonable verdict which the jury could return was a verdict for the plaintiff, and he told the jury, in unequivocal terms, to give the plaintiff a verdict in the amount of $26,650.00 (R.R.T. 818-819). Plaintiff's counsel requested the jury to award the sum of $250,000.00 to his client (R.R.T. 762). The jury returned a verdict in favor of the plaintiff in the amount of $149,000.00 (R.C.T. 7).

At no time during the opening or closing arguments of plaintiff's counsel did defendant's counsel object, assign error or request that the jury be admonished. After the completion of the arguments the motion of defendant's counsel for a mistrial was denied (R.T.T. 850-855). He did not make a request at that time that the jury be admonished to disregard any of the statements made in argument by plaintiff's counsel.

In the briefs filed in the state appellate courts the defendant contended that the trial court had erred in its rulings relating to the admissibility of evidence and in several of the instructions which were given

to the jury. The defendant also asserted in its briefs that the verdict was excessive as a matter of law and that plaintiff's counsel had committed prejudicial misconduct in his arguments to the jury. The intermediate state appellate court, without holding that the damages awarded were excessive, reversed the judgment solely on the ground of misconduct on the part of plaintiff's counsel in argument.

The Supreme Court of the State of California granted plaintiff's petition for a hearing and affirmed the judgment entered in the trial court. In its opinion, the California Supreme Court rejected the defendant's contentions relating to the issue of liability, holding that on the record presented the only reasonable conclusion was that the defendant had conceded its liability to the trier of fact and in any event the claimed errors could not have resulted in a miscarriage of justice (R.O. 4). The California Supreme Court also held that, under a well settled procedural rule which has been uniformly applied in appeals arising out of civil actions tried before juries, defendant's claims of misconduct were entitled to no consideration on appeal, since the record did not show that the defendant's counsel had made timely and proper objections or that he had requested that the jury be admonished (R.O. 11-14). It was held that the misconduct of plaintiff's counsel could have been obviated by timely objections and instructions, and by failing to make such objections defendant waived its right to complain (R.O. 11-14).

At no time before, during or after the trial did the defendant ever take the position that it had a right to a unanimous jury verdict in this case. No such contention was made in any of its briefs, and this point was never considered by the state courts. state courts.

ARGUMENT

I.

The Decision of the California Supreme Court Does Not Present Any Federal Question.

A. The determination of the California Supreme Court is based solely upon the application of a state rule of procedure.

The decision of the California Supreme Court in this case rests upon an independent state ground, and it does not present any substantial federal question for review. Under well established rules of procedure in California, seasonable objections must be made at the trial to any improper statements of opposing counsel, and, in order to warrant a new trial or a reversal on that ground, the trial court should be promptly requested to admonish the jury to disregard the improper remarks or comments. In the absence of timely objections and proper requests the alleged misconduct will not be considered on appeal, if an admonishment would have been effective to remove its effect upon the jury. (*State Rubbish etc.*

Assn. v. Siliznoff, 38 Cal. 2d 330, 340; 240 P. 2d 282, 287; *Scott v. Times-Mirror Co.*, 181 Cal. 345, 368; 184 Pac. 672, 682). In some criminal appeals it has been held that if the misconduct of counsel was of such a character that it could not be purged of its harmful effect by an admonition, it may serve as a ground for reversal, even though no objection at all was made and no admonition of any kind was requested on behalf of the accused. (See, e.g., *People v. Lyons*, 47 Cal. 2d 311, 318; 303 P. 2d 329, 333). There does not appear to be any civil appeal in which the California appellate courts have gone that far. In a few cases the failure to object on every possible occasion has been excused where there were at least some objections and where the misconduct involved was regarded as so incurably prejudicial that an admonition would have been ineffective. (See, e.g., *Peacock v. Levy*, 114 Cal. App. 246, 252; 299 Pac. 790, 793).

In other California cases, both civil and criminal, the misconduct of counsel has been held to constitute reversible error, notwithstanding the fact that the jury was in fact admonished to disregard the improper statements. In these cases, the admonitions given by the trial court were regarded as insufficient to cure the harmful effect of the particular misconduct. (See, e.g., *Gackstetter v. Market Street R.R. Co.*, 130 Cal. App. 316, 326-327; 20 P. 2d 93, 97; *Diebler v. Wright*, 119 Cal. App. 277, 282-283; 6 P. 2d 344, 346; cf., *People v. Hidalgo*, 78 Cal. App. 2d

926, 948-949; 179 P. 2d 102, 111). The question in cases of this kind is not whether the appellant waived the right to an appellate consideration of the claim of misconduct, but whether the trial court adequately removed the effect of an impropriety which had been properly brought to its attention and reserved for review on appeal.

None of these rules, of course, are peculiar to California. Similar rules are applied in virtually all of the state courts. (See, 5 Am. Jur. 2d, Appeal and Error, § 624, pp. 82 et. seq.; 4 C.J.S., Appeal & Error, § 297 (2) (a), pp. 918 et. seq.).

It is fundamental that a state may decide, under its own procedural rules, whether or not a claim under a statute of the United States has been set up at the proper time and in the proper manner, provided only that such decision of the state has not been made in a spirit of evasion for the purpose of defeating the claim of federal right. (*Atlantic Coast Line Railroad Company v. Mims*, 242 U.S. 532, 535). In the present case, the California Supreme Court has decided that the defendant, by reason of its failure to comply with the state procedural rule requiring timely objections as a prerequisite to a claim on appeal, is precluded from asserting that the conduct of plaintiff's counsel requires a reversal of the judgment. This decision, therefore, is based upon a non-federal ground, and there is no basis for a review by this Court.

B. The decision of the California Supreme Court does not involve any discrimination against rights arising under federal law.

The procedural rule which has been applied in this case is one which the appellate courts of the State of California have uniformly applied in all types of civil actions tried before a jury. In support of the application of that rule, the opinion has cited several prior decisions of the California Supreme Court. (*Seffert v. Los Angeles Transit Lines*, 56 Cal. 2d 498, 509; 15 Cal. Rptr. 161, 168; 364 P. 2d 337, 344; *State Rubbish etc. Assn. v. Siliznoff*, 38 Cal. 2d 330, 340; 240 P. 2d 282, 287; *Hicks v. Ocean Shore Railroad, Inc.*, 18 Cal. 2d 773, 787; 117 P. 2d 850, 858; *Cope v. Davison*, 30 Cal. 2d 193, 202; 180 P. 2d 873, 879). None of these cases were brought under the Federal Employer's Liability Act or under any other federal statute.

Petitioner has asserted that the California Supreme Court has created a special exception for cases arising under Federal Employers' Liability Act, citing the *Gacksetter*, *Diebler* and *Hidalgo* cases, which have been mentioned above. In those cases, however, the right to an appellate review had been substantially preserved, and the claim of misconduct was considered on its merits. Moreover, in the present case, the California Supreme Court did consider whether the misconduct of plaintiff's counsel was of such a character that its effect upon the jury could

not have been removed by an admonition. The opinion states:

> "In the instant case, we do not deem Mr. Boccardo's conduct to be of such a character that it could not have been obviated by timely objections and instructions." (R.O. 13-14).

It is clear, therefore, that after a thorough and impartial consideration, the California Supreme Court has decided this case without any discrimination against rights arising under federal statute.

There is No Uncertainty or Lack of Uniformity in of the California Supreme Court and any decision of the United States Supreme Court.

Petitioner has stated that the decision of the California Supreme Court is in conflict with the decision of this Court in *Minneapolis, St. Paul, & Sault Ste. Marie Railway Co. v. Moquin*, 283 U.S. 520. There is no conflict. In the *Moquin* case, both the issue of liability and the issue of damages were contested, and the jury's determination of these issues was inextricably blended in a single verdict. On the defendant's appeal from the judgment in favor of the plaintiff, the Supreme Court of Minnesota made an express determination that the verdict was, at least to some extent, the result of passion and prejudice engendered by misconduct on the part of plaintiff's counsel. The State Supreme Court attempted to rectify this situation by requiring the plaintiff to agree

to remit a portion of the verdict in order to avoid a new trial. The United States Supreme Court held, in substance, that the attempt to cure the error was inadequate, since the misconduct of plaintiff's counsel may have produced a verdict which was wholly wrong and not merely excessive.

In the present case, the only issue submitted to the jury for its decision was that of damages. As the California Supreme Court has stated:

> "Defense counsel's unequivocal invitations to a plaintiff's verdict can only be construed, in legal significance, as a concession of liability under the Federal Employers' Liability Act or the Safety Appliance Act, or both of them, in spite of earlier formal denials of such liability." (R.O. 4).

Furthermore, in the various stages of the proceedings in this case, three state courts have considered the defendant's attacks upon the verdict, and there has been no determination, as there was in the *Moquin* case, that the record showed that the verdict was excessive. In its motion for a new trial and in its appeal to the state appellate courts, the defendant contended that the verdict was excessive as a matter of law. This contention was never accepted by the state courts.

In *Moquin*, therefore, there was a determination by the state court that the verdict had been vitiated by the improper conduct of plaintiff's counsel, but

the state court's attempt to remedy the error was inadquate. In the present case, there has been no determination by any court that the verdict was based on passion or prejudice, and the State Supreme Court, applying its own procedural rules in a uniform and impartial manner, has decided that the defendant's right to assert the claim of misconduct on appeal has been waived. It is apparent that there is no conflict whatsoever between *Moquin* and the present case.

II.

The Question of the Right to a Unanimous Jury Verdict Was Never Raised in the State Court, and This Contention is Not Entitled to any Consideration at This Time.

Unless a federal question has been seasonably raised in accordance with the requirements of state law, it is entitled to no consideration by the United States Supreme Court. (*Edelman v. California*, 344 U.S. 357, 358; *Congress of Industrial Organizations v. McAdory*, 325 U.S. 472, 477). At no time during any of the proceedings in the state court did the defendant ever assert that it was entitled to a unanimous jury verdict in this Federal Employers' Liability Act case. That contention first appeared in the Petition for a Writ of Certiorari. It is not properly before this Court, and it should not be considered by this Court.

III.

There is no Uncertainty or Lack of Uniformity in the Decisions Denying a Federal Right to a Unanimous Jury Verdict in a State Action Under the Federal Employers' Liability Act.

In *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S. 211, the Supreme Court held that there was no federally guaranteed right to a unanimous jury verdict in a state action brought under the Federal Employers' Liability Act. This rule was subsequently reaffirmed. (*Chicago R. I. & P. R. Co. v. Ward*, 252 U.S. 18). The reasoning underlying the holding in *Bombolis* is that state courts are not under any compulsion to provide the jury which is required of federal courts by the Seventh Amendment. This reasoning was not repudiated, nor was it questioned, in *Dice v. Akron, C. & Y. R. Co.*, 342 U.S. 359. It is still constitutionally valid. In recent decisions several State Supreme Courts have manifested their understanding that the rule of *Bombolis* still prevails, and they have adhered to the principle that state courts are not restricted by the Seventh Amendment, either in actions under the Federal Employers' Liability Act (*Vivian v. Atchison, Topeka & Santa Fe Railway Co.*, 69 N.M. 6; 363 P. 2d 620) or in other actions involving the application of federal substantive law (*Irwin v. Globe-Democrat Publishing Company*. (Sup. Ct. of Missouri) 368 S.W. 2d 452, 459; cert. den. 375 U.S. 908). Even if petitioner had raised

this point in a timely manner, it has offered no sound reason why the *Bombolis* decision should be reconsidered.

Conclusion

For the reasons set forth herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN W. MONTGOMERY
JAMES F. BOCCARDO
EDWARD J. NILAND
By JOHN W. MONTGOMERY
Attorneys for Respondent